

**Thatcher Glass Manufacturing Co., a Division of
Dart Industries, Inc. and Richard F. Cowan.
Case 22-CA-10255**

November 4, 1982

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On January 25, 1982, Administrative Law Judge Thomas T. Trunkes issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and brief supporting in part the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In agreeing with the Administrative Law Judge that deferral to the parties' prearbitral agreement in this case is not appropriate under the standards for such deferral long adhered to by the Board and initially established in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), Members Jenkins and Zimmerman note that the grievances were not adjudicated and the alleged discriminatees were not involved in the final settlement. *Roadway Express, Inc.*, 246 NLRB 174 (1979). They also agree with the Administrative Law Judge that the these two employees were discharged/suspended for cause and that dismissal of the complaint herein is warranted.

Since he agrees that the alleged discriminatees were disciplined for cause, Member Hunter finds it unnecessary to reach the issue of whether the Board should defer to the grievance settlement agreement reached between the Respondent and the Union.

DECISION

STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge: The above proceeding was heard in Newark, New Jersey, on May 28 and 29 and June 15 and 16, 1981, upon a charge filed on September 9, 1980, by Richard F. Cowan, an in-

dividual, herein called Cowan, and a complaint and notice of hearing issued thereon on October 24, 1980, pursuant to Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, which alleges that Thatcher Glass Manufacturing Co., a Division of Dart Industries, Inc., herein called Respondent, violated Section 8(a)(3) and (1) of the Act by discharging (later modified to a 45-day suspension) two employees, including Cowan.

All parties were represented at and participated at the hearing,¹ and had full opportunity to adduce evidence, examine and cross-examine witnesses, file briefs, and argue orally. Both counsel for the General Counsel, herein called the General Counsel, and Respondent waived oral argument and both filed briefs. The issues presented in this case are the following:

1. Whether the two alleged discriminatees are estopped from pursuing remedies under the Act, after accepting reinstatement to their former position (with 45-day suspensions without pay and with written warning) pursuant to their union's settlement of their grievance.

2. Whether Respondent discharged, suspended, and issued disciplinary warnings to the two alleged discriminatees in violation of Section 8(a)(3) and (1) of the Act.

Upon the entire record in this case, including my evaluation of the reliability of the witnesses based on the evidence received, and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The pleadings established, and I find, that Respondent, a Delaware corporation, is engaged in the production and sale of glass products at its plant located in Wharton, New Jersey, where it purchased, transferred, and delivered goods and materials valued in excess of \$50,000, directly from States of the United States other than the State of New Jersey. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Respondent admits, and I find, that Glass Bottle Blowers Association of the United States and Canada, Local 225, AFL-CIO, herein called the Union, is, and has been at all times herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent's operations

Respondent is engaged in the business of manufacturing glass products. Basically, this operation consists of mixing raw material, feeding it into furnaces, and melting it down. The raw material is then set out of the furnace

¹ Cowan was represented by the General Counsel only.

into glass-making machines that produce containers. Respondent has six container plants of which Wharton is the newest. The Wharton plant was originally built in 1965, and employs between 750 and 800 employees. Of this number, the principal employees involved in the instant case are as follows: Richard T. O'Neill, plant manager; Paul Higgins, personnel manager; Robert Fenstermaker, supervisor of furnace operators; Martha Ferrari, checker, vice president of Union, and member of business committee; Richard Funk, journeyman maintenance man, chief shop steward, and member of business committee; Richard F. Cowan, furnace operator, member of business committee, and alleged discriminatee; Russell Swayze, furnace operator and alleged discriminatee; Bob Tygar, journeyman maintenance man and president of Local Union.

It is noteworthy that prior to becoming plant manager in 1978, O'Neill was the administrative assistant for 1 year, and prior to that he was personnel manager from 1972 to 1977. As personnel manager, he was responsible for administration, labor relations, safety, public relations, and other duties relating thereto. The personnel manager held the ultimate responsibility, according to O'Neill, for the disciplining of employees with few exceptions.²

Cowan, the Charging Party and one of the two alleged discriminatees, testified as follows:

There are two furnaces at the plant, the flint tank and the amber tank, both of which melt raw material into glass. His duties included caring for both of these furnaces. The flint tank is approximately 6 years old. The amber tank is less than a 1-1/2 years old, commencing operation in January 1980, having replaced an existing tank that also produced amber. In the old tank, optics³ were shot at all the ports and reported on an optic log or optic sheet,⁴ and then determined the temperature of these optics, after which manual adjustments to control the fuel were made. In the new tanks the temperatures were automatically controlled and required far less optics. The optics and the optic sheets were discontinued when the new tank was completed. The control room has a new batch-weighting system, which eliminated the need for a batch mixer⁵ who had previously done this job manually. Thereafter, all the duties of the batch mixer became the responsibility of the furnace operator, who then was designated as furnace operator/batch mixer.⁶

According to Cowan, his chief duty other than weighing materials was to keep pipes and gates unclogged, as foreign matter such as wire, tape, logs, and other materi-

als, were constantly jamming equipment. As a result, the furnace operator was out of the furnace room a great deal of time, particularly the first 6 months after the new furnace was completed. Cowan further stated that the new furnace had considerably more alarms than the old one. It also had an electronic computer which recorded the temperature hourly. Cowan further stated that, when the new furnace was completed, the optics were far less important and were taken basically on the hot spot⁷ of the furnace. The difference between the optic sheets on the old furnace and those on the new furnace was that in the former the optic sheets indicated prescribed times to shoot optics and prescribed the number of ports that were to be done, while in the latter a measurement was made at the hot spot.

Cowan further testified that there were alarms to indicate reversals on the new furnace.⁸ However, it did not include an alarm for an incomplete reversal which was installed after July 13, 1980. Cowan claims that he was not informed that the new amber furnace did not have an alarm to indicate reversals.

According to Cowan, one of Respondent's supervisors, Arthur R. Hooten, at the time general manager of all Respondent's plants, gave instructions regarding the use of the new amber tank in a training session 2 months prior to the tearing down and rebuilding of the new tank. All the furnace operators, as well as all department foremen and department heads, were present in the conference room in the executive office. Hooten stated that the furnace operators would no longer run the furnace by optics, but would run the furnace by heating the bottom temperatures,⁹ and that optics would be extremely difficult since the new furnace had batching running from one end of the furnace to the other.

Russell Swayze, the second alleged discriminatee, testified that prior to the installation of the new furnace, meetings were held in November 1969 to discuss its future operations. At this meeting, Hooten explained that the new tank would be operated completely different from the old tank as it would be operated by bottom temperatures which would eliminate the shooting of excessive optics. He further testified that the new furnace had a new series of alarms, but it had no alarms for reversals. Prior to July 13, 1980, Swayze was never instructed about any instrument on the new amber furnace that would indicate a lack of reversals. The new furnace had various instruments including a furnace pressure instrument, a glass level instrument, a fuel and combustion air instrument, a refiner and bridge wall instrument, and a complete temperature read-out instrument. The furnace operators were instructed to monitor a log of all the instruments and charts. However, none of Respondent's su-

² No information with respect to these exceptions was adduced.

³ An optic is the use of a perometer which is placed in one of the forks on either side of the tank. It is able to determine within a few degrees the temperature in that area of the furnace.

⁴ Optic sheets describe certain optics to be taken on certain ports and at certain times.

⁵ The batch mixer mixes the feed and checks the batch material at the proper rate, and maintains necessary records. He also keeps pipes and gates unclogged of foreign material.

⁶ According to the collective-bargaining agreement between Respondent and the Union, a batch mixer was classified as grade 8, while both the furnace operator and the furnace operator/batch mixer were classified as grade 10. Thus, the latter categories received a higher pay scale than that of batch mixer.

⁷ The hot spot is a particular spot in the furnace which is measured frequently as it is a good indicator of the total heat in the furnace. It is usually located near the bottom at one of the sides.

⁸ Reversals were defined as the transferring of the firing of the furnace from the right to the left side which takes place every 20 minutes and then reverses.

⁹ Bottom temperatures reflect the electrical heat that radiates through the glass, and basically melts the materials from the bottom up. In the old furnace, the fire melted the raw materials down into an already existing small lake of glass.

pervisors told Swayze which gauges to monitor, nor did anyone instruct him which ones not to monitor. He claims that nobody ever explained that the bridge wall and the refiner temperature chart would indicate a lack of reversal. Although Hooten stated to the furnace operators that the new furnace was going to operate on bottom temperatures which would eliminate the need for shooting optics, optics were still being shot because, according to Swayze, they are still necessary. He stated that he never was told the amount of time to shoot the optics on the hot spot.

Fenstermaker, the furnace-operator supervisor of Respondent, testified that the new furnace began production in January. Following the installation of the new furnace, there was a rearrangement of jobs around the furnace. The old furnace still had batch mixers and furnace operators, but the new furnace was handled by a combination job furnace operator/batch mixer. The new furnace is basically an automated operation whereas the old furnace is basically a manual operation.

Don Pullman, supervisor of the batch and mix department since November 1980, commenced employment with Respondent as supervisor in the melting department in June 1977 where he worked for 14 months, at which time the old amber furnace was in operation. He then was transferred to another plant of Respondent and returned to his present position in November 1980. Pullman testified that Respondent makes approximately 2 million bottles per day at the Wharton plant, and that 700 to 800 tons of glass a day is produced, approximately 60 percent of this in the new furnace. Approximately 300 to 400 employees are dependent upon the functioning of this furnace. It is the newest furnace in the Company and possibly one of the largest in the country of this type. Each furnace is manned by one operator, the furnace operator on each shift. On the 4 p.m. to 12 midnight shift, there are at least two or three supervisors constantly on call through the use of either telephones or beepers. A supervisor out of beeper range will call in and leave a number where he may be reached. The operators are aware that at any time a problem occurs which cannot be handled by either themselves or the shift maintenance man, they are to contact their supervisor. Pullman further testified that the new furnace cost in the neighborhood of \$2 or \$3 million and that the life expectancy is from 4 to 5 years. He further stated that a bell system indicates reversals. An alarm bell rings for 10 or 15 seconds which alerts the operator that the reversal is about to occur. This is followed by another bell which rings approximately a half minute, after which the gas shuts off, indicating the first step of the reversal. Even if the operator were not within the hearing range of the bell, he would be aware that a reversal is taking place because he would hear very clearly the gas shutting off and going back on as it makes a very loud noise. Pullman contradicted Cowan by stating that there was always an alarm to signify the incomplete reversal. He described an incomplete reversal as follows: "If the bell had been ringing or both bells had been ringing and the gas has not shut off, there would have been an alarm which would go off. No ringing of bells signifies no reversal

whereas an incomplete reversal occurs when the bell rings, something malfunctions, and the alarm goes off."

Fenstermaker further stated that on the old furnace there was an alarm to indicate an incomplete reversal. Contradicting Cowan and Swayze, he denied that furnace operators were instructed to shoot only the hot spots in one specific port. He stated that they were to shoot the hot spots until "they were satisfied that the furnace was in control off of the hot spot, following which they were to shoot other optics off of some other ports."

Arthur Hooten, the manager of the furnace operation for the past 4 years for Respondent's entire operation, visited the Wharton plant in the fall of 1979 for the purpose of conducting training sessions with respect to the operation of the soon-to-be new furnace. Hooten denied that he told the furnace operators that they were not to rely on optics, as optics would be extremely difficult inasmuch as the new furnace had batch running from one end to the other. He emphasized that the "batch running" has nothing to do with shooting optics.

2. Union status

According to O'Neill, the Union represents the production and maintenance employees in all the plants, including approximately 95 percent of all the glass workers.

Ferrari testified that the Union and Respondent have established a business committee with representatives of both parties whose function is to solve any disputes between Respondent and the Union. Respondent's representatives on the business committee are Paul Higgins, personnel manager, and George Solyak, assistant personnel manager.¹⁰

The representatives of the Union included Tygar, Funk, Cowan, Bobby Lawler, representing the machine repair department, Cliff Norman, representing the shipping department, Billy McCrom, representing the carton department, and Ferrari. The business committee meets once a month to discuss problems involving the Company and the Union.

3. Furnace operator/batch mixer positions

Prior to June 1980, the collective-bargaining agreement between the Union and Respondent listed a position as batch mixer as labor grade 8. The position of furnace operator is listed as grade 10. In June 1980, the position of batch mixer was consolidated with that of furnace operator and since that time the combination position of furnace operator/batch mixer is listed as labor grade 10. Thus, since June 1980 both the two alleged discriminatees had supplemental duties of batch mixer in addition to their furnace operating duties. According to O'Neill, the typical furnace operator earns approximately \$16,000 to \$18,000 a year. The furnace operator position is low in physical effort but high in responsibility. The number one responsibility of the furnace operator "involves the integrity of the furnace." O'Neill testified that the job description of the position has been in effect for at least 5 years and the Union is aware of it. According

¹⁰ These were the representatives during 1980.

to Respondent's Exhibit 4, it lists the primary function of a furnace operator/batch mixer as the following: "Operate and maintain the continuous operation of the furnace and prepare the batch mixer. The typical duties of this position include the following: Mix feed and check all batch material at proper rate; make temperature changes according to tonnage; read the various instruments and interpret their meaning; take melter and refiner optics; adjust air-gas ratio; maintain furnace log, batch can tally, batch can inspection, and other necessary records; take necessary corrective action in emergencies; take samples of batch to lab for testing." The two alleged discriminatees, with support from Funk, the chief shop steward, maintained that their principal concern when the new furnace began operation was that of batch mixer. This was disputed by Fenstermaker, who testified that the first priority for the furnace operator is the furnace as the furnace may be an immediate problem and the problem with the mixer gate is not going to affect anything for several hours. He stressed that he informed every furnace operator of their priorities, specifically recalling passing this information to Cowan and all of the other furnace operators. Fenstermaker further testified that when an operator sees the gas consumption continue to rise, he should check the furnace to ascertain if a problem exists, and should he be unable to detect or solve the problem, he is to notify a supervisor. The new furnace contains many instruments which perform the same functions as they did on the old furnaces.

4. Union activity of Cowan

Cowan has been employed by Respondent for approximately 12 years, the last 10 as a furnace operator. From 1975 until October 1976 he was a shop steward for the Union at the plant. He thereafter ran for president of the Union but was unsuccessful. In 1979, recently elected President Tygar appointed him as a business committeeman to the business committee. Cowan attended the business committee meetings and participated at these meetings. His main function was to process grievances of employees in his department. From October 1979 to July 1980, Cowan submitted six grievances, only one of which concerned himself. Cowan testified that while processing one grievance he asked of a company official, Thiel, the disposition of the grievance. Rather than answering the question, Thiel turned to another employee and stated, "This guy is an instigator." Ferrari, who has been on the business committee since October 1979, testified that Cowan was assigned to the committee approximately November 1979 by the union president. He represented the batch department and also became involved in other disputes concerning other departments. Ferrari testified that during the months of April, May, and June 1980, Cowan was more involved with problems of the batch department. He presented several problems to the committee such as safety hazards, poor lighting in the furnace room, no water fountain, lack of proper break periods, and excessive dust in the air. She specifically recalls that in late 1979, Cowan presented a grievance with respect to overtime pay involving him. O'Neill became "upset" and stated that he believed Cowan was trying to get paid for something to which he was not entitled.

Further, at a business meeting conducted in 1980¹¹ on the complaint of the Union with respect to increase of workload in the batch department, Cowan stated, "We're having a lot of problems as to the workload. The Company is trying to keep the same men in the post." Although Ferrari testified that Cowan brought up many matters at business meetings involving grievances, these are not reflected in the minutes of the business meetings.

O'Neill testified that Cowan did an average job in representing the batch department, but was not as outspoken as Ferrari. George Solyak, present personnel manager of the plant for approximately 6 weeks prior to the hearing, and, prior to that, assistant personnel manager for approximately 22 months, testified that the number of grievances filed plantwide in 1980 was 115. Of this number, Ferrari filed 24, while Cowan filed 5. According to Solyak, at business meetings both Funk and Ferrari were the two most active union committee members. He does recall Cowan raising a problem relating to the water cooler, but not relating to the dust problem. Respondent submitted into evidence Exhibits 20, 21, and 22, relating to seniority grievances in the batch department. It is noted that, although the batch department was under the jurisdiction of Cowan, his name does not appear on any of the grievances, but all were signed by Ferrari.

Tygar, president of the Local, testified that Cowan is a good union member who is an aggressive member of the business committee, and that he did display such aggressiveness at the business committee meetings. He further stated that he appoints aggressive individuals to the business committee meetings. Higgins testified that he never had any conversations flavored with any animosity of any kind with Cowan. O'Neill testified that he had been instrumental in a number of union activists being promoted. Specifically, Dick Shalop, the first president of the Union, became a foreman within the past few months.¹² Dennis Jorski, chairman of the business committee, subsequently became a foreman approximately 4 or 5 years ago. Ralph Collins, chairman of the business committee and vice president of the Union, became a maintenance foreman 2 years ago. Ken Nailer, chairman of the business committee and also vice president of the Union, became maintenance foreman and subsequently worked in the personnel department as a safety supervisor.

The only evidence of possible animosity toward Cowan by O'Neill or any other management or supervisory personnel of Respondent occurred in 1977 when O'Neill, by letter, expressed "disgust" toward Cowan with respect to a grievance involving money.¹³

5. Union activity of Russell Swayze

Swayze has been employed by Respondent as a furnace operator for 8 years. Prior to July 13, 1980, he had never been disciplined by Respondent. Since October 1979, Swayze has held the position as shop steward for the batch melting department. In this capacity he filed

¹¹ The testimony was not clear as to when the meeting took place.

¹² Shalop was the individual principally responsible for organizing Respondent's Wharton plant for the Union in 1965-66.

¹³ The complete letter was received as G.C. Exh. 9.

one grievance concerning premium time pay for another furnace operator. He testified that other grievances arose in his department since he became shop steward, but they were handled by Cowan.

Higgins, the personnel manager, testified that in the 7-month period prior to July 1980 the union representatives of the business committee who were the most aggressive pursuers of grievances were, "Martha Ferrari, who wrote the most, and Dick Shalop, who had the most to say." Fenstermaker testified that virtually everybody complained about the dust and heat problems. He does not recall any particular complaint from Cowan with respect to the air-conditioning system in the controls. He does not recall any particulars about the grievance concerning seniority, but does recall discussing the problem of breaks for the employees which may have been discussed with Cowan.

6. Union animus of Respondent

Cowan admits that in 1975 and 1976 he was an active shop steward, but during that period he did not suffer any disciplinary action from Respondent. Swayze stated that, although he was a shop steward, he was never threatened by Respondent because of any of his union activity. Furthermore, Swayze testified that he "does not believe that the Company was out to get him because of his union activity" Funk testified that he had many confrontations with O'Neill over matters that arose at business committee meetings and that these confrontations occurred also between other union representatives at the business committee meetings and representatives of management. Joseph Mitchell, the executive officer of the International Union who had serviced Respondent's various plants since 1973, testified that, although the Union and Respondent disagreed many times on many important issues throughout the years, he did not detect any antiunion bias on the part of Respondent. Tygar, president of the Local, described his relationship with Respondent as one in which it and the Union had had disagreements in the past, but the Union has had good rapport with Respondent. He never found that any representatives of management, including O'Neill, were hostile towards him or towards his local.

7. Events of July 13

a. Swayze's shift

On July 13, a Sunday, Swayze worked the 8 a.m.-4 p.m. shift alone. He testified that he had problems both with the batch system and with the furnace. With respect to the batch system, he had to leave the furnace room to go down to the mixer floor to unplug the mixer gate. This was happening quite frequently, occurring approximately three or four times an hour. Although the problems existed with the mixer gate from 8 a.m., witness did not call for help because it was a routine problem which he was able to solve. With respect to the furnace problem, he called Supervisor Butler who explained

to him there was a composite temperature on the tank which should take care of the problem.¹⁴

Swayze shot optics on his shift until approximately 1:10 p.m. After that, he experienced a problem with the mixer gate at reversal time which lasted anywhere from 5 to 7 minutes. As the reversal lasted about 90 seconds to 3 minutes, he could not shoot an optic as optics can only be shot when a reversal takes place. He admits having shot approximately 10 or 12 optics before 1:10 p.m. He conceded that it is essential that optics be taken because if the furnace operators do not know the situation at the "hot spot" it is conceivable that the furnace could melt. Swayze stated that up until 1 p.m., the furnace had been reversing.¹⁵ At 1 p.m., Swayze began to have problems with the mixer gate with respect to the operation which allows the batch to go into a hopper. Swayze testified that furnace operators are alerted to the problem by a bell which goes off in the "way room," a distance of approximately 10 minutes to solve. After solving the problem at the gate, he returned to the control-area room to monitor the gauges which make certain that the furnace is running properly. The problem at the mixing gate occurred throughout the remainder of Swayze's shift. He testified that at times, while he was solving the problems at the mixer gate, he received a signal that a reversal was about to start, but, before he could shoot an optic, the reversal passed. Therefore, he went to the furnace window to check the slide scale to ascertain that the gas was on. He stated that he had been left with the impression by his supervisors that when the reversal did not go off, fuel would not enter the tank.¹⁶ Swayze testified that when Cowan relieved him at 4 p.m., he notified Cowan of the problem he was having, but did not tell him that he had spoken to anyone about the problem, nor did he suggest that Cowan call somebody because he was certain that Cowan was competent to handle the problem himself.

b. Cowan's shift

Cowan worked the 4 p.m. to midnight shift on July 13, relieving Swayze. He testified that Swayze notified him that he had problems with the mixer through the day gate as there was a huge amount of paper, carbon, wire, cord, and other matter jamming the gate regularly. He told Cowan that he would have problems with this also. When Cowan began his shift, he took readings on some nearly 50 different instruments which is done hourly. Upon completing his readings, he proceeded to the mixer floor to clean the debris that had accumulated in the mixer gate, taking from 35 to 40 minutes to complete the job. He returned upstairs and took a 5 p.m. reading. After completing it, he heard an alarm involving

¹⁴ This problem was experienced on a prior occasion in April or May 1980, at which time Swayze called Butler who advised him that the composite temperature was programed to add the fuel to the tank as the tank cooled.

¹⁵ It is necessary that the furnace reverse on a regular basis; otherwise it might collapse. The furnace reverses in order to equalize the temperature in the tank.

¹⁶ Swayze stated that his immediate Supervisors Steele, Butler, and Fenstermaker told him of this. However, he did not recall receiving any prediction of what would happen if fuel did not enter the tank.

the pressure of the furnace. Unable to solve the problem, he called shift maintenance man Robert Langley, who discovered that they had to remove the handle of a crank which was bolted on the furnace. After the furnace pressure decreased, Cowan returned to his office and proceeded to do his 6 p.m. reading. The reversal bell rang just about that time, and he thereafter shot an optic. He then discovered that the fire did not shut off. He returned to the control room and explained this situation to Langley. He waited at the control room to observe what would happen at the next reversal. In 20 minutes, Langley and Cowan found that the furnace again would not reverse. Knowing there was a problem, Cowan called Fenstermaker. When Fenstermaker arrived, he checked the "tapes" and stated that he was surprised to find that at no port did recorders show any heating up at any spot in the furnace for any period of time. As the problem could not be solved, the instrument man¹⁷ was called. He arrived an hour later and discovered that there was a broken wire in the back of the enclosed timer. Cowan testified that there was no alarm to indicate a lack of reversal until after it was installed following the incident of July 13. He further stated that no damage was done to the furnace.

Robert Langley, employed by Respondent for 5 years, was shift maintenance man working the 4 p.m. to midnight shift on July 13. His responsibility includes making repairs during the shift and taking readings on equipment substations, such as temperature and water level. He testified that Cowan called him to the batch department, claiming he had a problem with the furnace pressure. He proceeded to the basement to check out various matter and could not find anything wrong. Returning to the furnace floor, he observed Cowan attempting to raise a damper to relieve the furnace pressure. He helped Cowan by removing the handle. Thereafter, the furnace pressure returned to normal, but Cowan noticed that the furnace had not reversed. Langley made a manual reversal, and after waiting 20 minutes for another reversal which did not occur, Cowan called Fenstermaker. When Fenstermaker came, he looked at the charts and called someone in to repair the timing mechanism. He also stated that, when Fenstermaker came and observed the readings, he appeared very upset and stated that, if Cowan had been taking optics, the problem would not have happened.

Fenstermaker testified that about 6:30 p.m. Cowan called him at his home and stated that he was having trouble because of furnace pressure, explaining that the furnace had not reversed. Fenstermaker came to the plant and after reading the charts (Resp. Exh. 15), he concluded that the furnace had not been reversing. He inspected the furnace that night and found that the right side was extremely hot and bright red.

8. Events of July 14

At approximately 8:20 a.m., July 14, Fenstermaker reported to O'Neill that the furnace did not reverse for 6 hours the previous day. He further reported that the two discriminatees were on duty that day and what had oc-

curred. Approximately 15 minutes later, O'Neill met with Higgins and Fenstermaker in his office and instructed Higgins to conduct an investigation, stating that, unless mitigating circumstances were found, the two alleged discriminatees should be discharged. Shortly thereafter, at approximately 9 a.m., Swayze was called into Fenstermaker's office. Present were Higgins and Funk. Fenstermaker informed Swayze that the furnace had been missing reversals, showing him tapes which Swayze stated did not mean anything to him. Fenstermaker then stated that he wanted to hear Cowan's version of the incident of July 13 and would get back to Swayze later.

Meanwhile, on Friday, July 11, Ferrari spoke to Solyak, assistant personnel manager, and informed him that the gas pump being used in the shipping department was unsafe, pointing out that gasoline stored in 55-gallon drums were stored above ground which is a safety hazard. Solyak responded that he would investigate the matter. Later that morning, Higgins approached Ferrari at her job station and asked about the situation. She informed Higgins that, unless something was done to correct the problem, she would report the matter to OSHA (Office of Safety and Health Administration, U.S. Department of Labor). After some discussion, Higgins promised that the matter would be settled, and in fact posted a notice, a copy of which he handed to Ferrari, stating that no gasoline was stored above ground. Later that evening, Ferrari received a call from one of the employees in the shipping department who stated that they were still having problems with the gas pump. She telephoned Funk, the chief shop steward, and both returned to the plant and observed that gasoline was being stored above the ground and the gas pump was leaking.

On Monday, July 14, Ferrari informed Joseph Mitchell, the International representative, what occurred and also spoke to a Mr. Nero of OSHA and detailed the situation to him. Nero stated that he would visit the plant to verify the problem. Nero visited the plant about 9:45 a.m. and, after inspection of the premises, cited Respondent for a violation. Ferrari received a copy of the violation with a cover letter from OSHA, identified as General Counsel's Exhibits 2(a) and (b).

Following the OSHA inspection, Higgins met Funk again. Funk asked if he had made a decision on Swayze, to which Higgins replied negatively. Funk pleaded that Swayze was a good man and asked Higgins to, "Give the guy a break." He asked that some consideration for the man's length of service and his age be given. Higgins replied that he would take that into consideration. At approximately 4 p.m., Swayze was called into Fenstermaker's office. Higgins and Funk were also present. Higgins handed Swayze a suspension slip, signifying a 3-day suspension pending termination for poor work performance (G.C. Exh. 5).

Cowan came to work at approximately 4 p.m. to relieve Swayze. He was informed by one of the other furnace operators to go to Fenstermaker's office. He proceeded to do so and encountered Fenstermaker, Higgins, and Funk. Cowan was asked for an explanation of what occurred on July 13. He then made a presentation lasting well over 1 hour, detailing what he did on Sunday, July

¹⁷ He was not identified by name.

13. At the conclusion of his explanation, Fenstermaker presented him with a 3-day suspension pending termination notice (G.C. Exh. 3). Cowan claims that the document was presigned, had been completed, and was waiting on the desk to be handed to him at the end of his explanation.

Higgins testified that the reason that he did not believe there were mitigating circumstances is that, between 3:30 and 5 p.m., Cowan was not in the furnace room or by the furnace itself. He concluded that Cowan used poor judgment for that time period, and that it was on that basis that he took his initial stand of suspending him pending discharge. O'Neill testified that the investigation did not disclose any mitigating circumstances and, therefore, the terminations remained. He justified the termination of Cowan by stating that, when Swayze told Cowan about the furnace problem, Cowan should have taken steps to resolve that problem rather than attempting to solve the batch-system problem.

9. Events subsequent to July 14

Following their discharges, the employees filed grievances with their union. Contact was made with Mitchell, the executive officer of the International Union, who met with Higgins and the complete business committee to review the grievances. After reviewing the entire situation, he asked Respondent to reconsider its action. Upon receiving a negative answer, he thereafter had conversations with Chamberlain, head of labor relations for Respondent. Chamberlain and Mitchell agreed that the two alleged discriminatees be returned to their former positions as furnace operators after a 45-day suspension. Subsequently, the two alleged discriminatees received a letter ordering them to return to work on August 27. Swayze stated that, although disappointed with the result, he did nothing, "because the case was closed as far as he was concerned." Cowan, dissatisfied with the result, filed the charge which led to the instant complaint.

B. Contentions of the Parties

1. Contentions of the General Counsel

The General Counsel makes the following contentions:

1. Respondent discharged Cowan because of his aggressiveness in processing union grievances as O'Neill has had a longstanding animus towards Cowan.
2. The decision to discharge the two discriminatees was made subsequent to the citation of Respondent by OSHA, which demonstrates the animus of Respondent toward the Union and its members.
3. Swayze was terminated in order to facilitate the discharge of Cowan.
4. Respondent used the incident involving the malfunctioning of the furnace on July 13 as a pretext.
5. Disparate treatment was accorded the two alleged discriminatees compared to discipline imposed by Respondent on other employees in the past.

2. Contentions of Respondent

1. The complaint should be dismissed as the Union and Respondent had effectuated a settlement agreement satisfactory to both parties.
2. The two employees were discharged for neglecting their principal function, which is to monitor the furnace and report any malfunctions to a supervisor.
3. There is no connection between the discharges and the OSHA citation.
4. There is no animus by Respondent, or any of its agents, against either the Union, Cowan, or Swayze.
5. There is no disparate treatment in the instant case.

C. Discussion and Analysis

1. The deferral issue

It is well settled that the appropriateness of deferral to arbitration was initially established in *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082 (1955), which sets the criteria for deferral as follows: (1) that the proceedings have been fair and regular, (2) that all parties had agreed to be bound, and (3) that the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.

In the instant case, no final resolution of the grievance of the two discriminatees was ever presented to either an arbitrator or any other body with authority to make a final adjudication under the contract. As the Board stated in *Whirlpool Corporation, Evansville Division*, 216 NLRB 183, 186 (1975), "[T]he full range of the mechanism for the determination of the dispute has not been utilized and there is no award that may be examined for its conformity with *Spielberg* requirements." In addition, as the General Counsel correctly points out, neither Swayze nor Cowan participated in the decision reached by the Union and Respondent to permit them to return to work and to receive a 45-day suspension. No evidence was adduced, furthermore, that any unfair labor practice allegations were considered by anyone in the decision reached. Thus, I find that Respondent's contention that the matter should be deferred to the decision of Respondent and the Union is without merit and, in view of the charges filed and the complaint issued in this matter, the Board, under the statute, is empowered to make a decision with respect to the alleged charges.

2. The alleged unfair labor practices

For the reasons stated below, I find and conclude that the General Counsel has not sustained his burden of proof that either Cowan and/or Swayze were discharged by Respondent for discriminatory motives in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel contends that Respondent discharged Cowan because of a longstanding animosity exhibited toward Cowan by Plant Manager O'Neill and other management representatives because of his aggressiveness as a leading union activist. The details of Cowan's union activities are described elsewhere *infra*. There is no question that various representatives of Respondent were aware of Cowan's activities, and, at times, expressions of annoyance with respect to these activities

are attributed to Respondent's agents. However, I do not accord great weight to various factors which the General Counsel contends "proves" that animosity exists toward Cowan by Respondent's agents. The letter of 1977 in which O'Neill expressed "great disgust" with respect to Cowan's insistence on overtime pay is too remote in time to bear any significance to the instant case. The fact that O'Neill may have been "upset" or whose face became "flushed with anger," even if I were to fully credit the General Counsel's witnesses on this score, does not add up to such animosity which would lead to a discharge of an employee. The Union's president testified that he only appointed aggressive union members to the business committee. The chief shop steward, Funk, stated that the most aggressive or active members of the business committee in terms of grievance filing is Vice President Ferrari, whereas Respondent's witness, Solyak, testified that Ferrari filed the most grievances while another member, Funk, was the most vocal at the business meetings. Further, Union President Tygar and Mitchell, executive officer of the International, testified that throughout their long relationship with Respondent as union officials, neither detected any animus of any of Respondent's officials, and that the Union and Respondent had had cordial relationships throughout the years, despite the fact that there were many disagreements relating to working conditions which eventually were solved between the two parties. The evidence adduced at the hearing revealed that O'Neill, both as personnel manager and plant manager, was responsible for promotion of various union officials to supervisory positions, including that of Shalop, the Union's first president who was responsible for the organizational drive at the Wharton plant. Further, at no time subsequent to the events of July 13-14, did the Union have any belief that either of the two individuals had been terminated because of any union activity on their part. Indeed, Swayze testified that he did not believe that his termination was a result of any union activity on his part. Lastly, no evidence was adduced of any independent 8(a)(1) conduct on the part of any of Respondent's agents which might tend to prove union animosity of Respondent.

With respect to the OSHA incident of July 14, the facts clearly demonstrate that it was Vice President Ferrari who not only threatened Respondent's agents that she would report a safety violation to OSHA, but did, in fact, consummate the threat. Funk, the chief shop steward, testified that Respondent official Decker indicated to him that he, Decker, was upset that the Union had not approached him first instead of taking the matter to OSHA. No evidence was adduced during the course of the hearing that either Cowan or Swayze was involved with the OSHA matter at all. Despite the timing of the two incidents, I cannot conclude that the discharge of Cowan and Swayze was in any manner connected with the OSHA citation. Neither Ferrari nor Funk were disciplined or rebuked in any manner with respect to the OSHA citation. O'Neill testified that OSHA had made dozens of inspections at the plant and Respondent was cited for violations in several situations. I credit O'Neill who stated that he did not recall OSHA being in the

plant on July 14 until the preparation of the instant case for hearing, and I further credit him in testifying that at the time of his determination to discharge the two employees, he had no knowledge that an OSHA inspection was about to take, or had taken, place.

I totally reject the General Counsel's theory that Swayze was discharged in order to facilitate the discharge of Cowan. There is no indication in the record, nor has the General Counsel offered any persuasive explanation, that Respondent, a company that has had good labor relations with its unions for many years, would be so callous as to discharge an "innocent" employee in order to cover up the discharge of a "troublemaker." Indeed, as he admitted on examination, Swayze never believed that his discharge was the result of any union activity. Although he appeared as a witness for the General Counsel, I was impressed that Swayze was a rather reluctant witness, and, although he sincerely believed that his course of actions on Sunday, July 13, was performed in a proper manner and should not have resulted in a discharge or a suspension, union animus on the part of Respondent was not an element considered in his discharge.

With respect to the contention of the General Counsel that Respondent's rationale for discharging the two furnace operators was only pretextual, I must state that, as counsel for Respondent succinctly states in his brief, "Notwithstanding the enormous amount of detail in the record concerning the nature of the furnace, its operation, the charts, the print out, the expert testimony, etc., the case for discharge may be summarized very simply. The furnace has to reverse."

The General Counsel spent an inordinate amount of time in an attempt to convince me that the breakdown of the furnace of July 13 in its failure to reverse was not the fault of either Cowan or Swayze. As I indicated to the General Counsel at the hearing, I do not have a degree in electrical engineering nor am I a trained furnace operator. Thus, I cannot make findings with complete certainty with respect to the technical aspects of this case. I indicated then, and I state now, that should I find that Respondent had reasonable grounds to believe, without any discriminatory motive, that the two furnace operators were responsible for the events of July 13, Respondent then could discharge them with impunity from the labor laws.¹⁸

The facts pertinent to this particular aspect of this case are simple, indeed. The two individuals were employed as furnace operators/batch mixers. The contract disclosed that batch mixers are classified as labor grade 8, whereas furnace operators and furnace operators/batch mixers are classified as grade 10. Thus, the two individuals received a higher salary or wage than they would have had they been batch mixer only. Despite Cowan's denial, I find that the duties and responsibilities of a furnace operator, compared to that of batch mixer, requires more responsibility and more intelligence. It is as furnace operators that the employees are classified as labor grade

¹⁸ Cf. The Administrative Law Judges' decisions which were affirmed by the Board in *Monterey Drilling Company*, 255 NLRB 494, 499-500 (1981), and *Field Packing Co., Inc.*, 220 NLRB 1188, 1197, 1199 (1975).

10, not as batch mixers. Thus, as Respondent urges, the principal function of the employees was that of furnace operator. The furnace operators' principal duty was to ascertain that the furnace was operating properly and to report any malfunctioning of the furnace to their supervisor. Despite the excuses offered by Swayze and Cowan with respect to the malfunctioning of the batch mixing operation, the fact is simply that the furnace failed to function properly and that no reversals had taken place between 1 p.m. and 6 p.m. before Cowan deemed it necessary to contact Fenstermaker. Thus, when Fenstermaker reported the matter to O'Neill, O'Neill had every right to conclude that the fault was with that of the furnace operators. It may well be that Cowan and Swayze were performing their jobs as best as they knew how, and, in good conscience, believed that they personally did nothing wrong. It may also be that neither of these furnace operators were adequately trained in operating the new furnace and were not informed which gauges they were to watch and which gauges had significant meaning. However, I find it difficult to credit them on this point. It would appear that both of these operators who are veterans at their jobs could not have functioned from January to July with no knowledge of the operations of the furnace to perform their jobs adequately. I credit Respondent's witnesses who state that they had trained the furnace operators as to the operation of the furnace. Further, one of the junior furnace operators testified that he was explained the operation of the new furnace by Cowan himself. As plant manager, O'Neill had every reason to believe Fenstermaker that it was the responsibility of the two furnace operators to report to supervisors should malfunctioning of the furnace take place. O'Neill further had every reason to believe that the two furnace operators, as well as all the other furnace operators, had been adequately trained to operate equipment which cost Respondent hundreds of thousands of dollars. It may well be, in fact, that a minor supervisor failed to adequately instruct the operators on the workings of the new furnace and, rather than admit this, the supervisor (Fenstermaker, for instance) covered his own hide by blaming the furnace operators for the malfunctioning of the new furnace. O'Neill, rather than discharging the employees on the spot in the early morning of July 14, afforded them an opportunity, through Higgins and Fenstermaker, to demonstrate mitigating circumstances for their inaction on July 13. Higgins, upon hearing the explanation of the two furnace operators, concluded that no mitigating circumstances existed, and, therefore, effectuated the discharges late in the afternoon of July 14. The General Counsel and the Charging Party may be absolutely correct that it was not the fault of the two furnace operators which caused the problem of July

13. Nevertheless, as Respondent, through O'Neill and Higgins, determined that the responsibility rested on the shoulders of these two individuals, and had good cause to believe that such was the case, I am compelled to conclude that the termination and suspension of the employees was, if not justified, at least reasonable, in order for Respondent to maintain proper discipline at the plant.

With regard to the contention that the two employees received disparate treatment compared to the treatment accorded to other employees in the past, the General Counsel adduced evidence involving four different employees. Two of these employees, Palma and Guerra, committed minor infractions which I do not consider comparable to the problem in the instant case. With respect to the other two cases, in 1974, employee Hector Aviles was on duty as a furnace operator. The furnace was fired from both sides, signifying that he neglected to cut off the oil from one side. As a result, the fire melted off part of a crown which lay on top of the batch mix, preventing heat from penetrating into the batch mix, and subsequently put the furnace out of operation for several days. O'Neill, then personnel director, agreed with the plant manager that this negligence on the part of Aviles required a discharge which was done. After approximately 6 months Aviles was reinstated to his job.

More recently, in January 1980, Leo Roper, another furnace operator, improperly shot optics, causing a rise in the temperature of the furnace to an excess of 100 degrees. Investigation disclosed that Roper was performing the operation inadequately and was not negligent. Although O'Neill claims that he did not participate in the disciplinary action against Roper, Roper did receive a 3-day suspension and was consigned to 30 days of training as a furnace operator.

The above two cited situations convince me that Respondent considers the operations of the furnace a very important matter. Thus, furnace operators are held responsible for any malfunctioning of the furnace. It should be noted that with respect to Aviles, O'Neill, together with the plant manager, did discharge Aviles. Thus, in attempting to show disparate treatment, the General Counsel, on the contrary, confirms my conclusion that Respondent considered the matter a serious one, and took similar steps with Cowan and Swayze as it had taken with Aviles almost 6 years earlier.

To sum up, I find no credible evidence to convince me that Respondent in any manner suspended and/or terminated Cowan and Swayze for any discriminatory reasons, and, therefore, I do not find a violation of Section 8(a)(3) and (1) of the Act. Accordingly, I recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

¹⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁹

The complaint is dismissed in its entirety.

become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.